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No. 86-1217

In The

Supreme Court of the United States

October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,
Petitioners,

v.

JOSE J. OLAGUES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO VACATE ON GROUNDS OF MOOTNESS

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In their brief on the merits, petitioners argue that the instant case is moot and that the appropriate disposition is to vacate the judgment of the court below. Respondents agree. Accordingly, respondents respectfully move this Court to vacate the judgment of the Court of Appeals below and remand the case to the District Court with a direction to dismiss the action. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). The grounds for this motion are that the case has become moot as a result of a change in California law.

PRELIMINARY STATEMENT

The governmental conduct at issue in the instant case was a voter fraud investigation carried out by the United States Attorney and local district attorneys and voting registrars in nine Bay Area counties. The means used to carry out the investigation was a review by the voting registrars of records of voters who had requested bilingual election materials, and the random selection by each registrar of 25 names of recently registered, foreign-born voters who had requested bilingual materials. These names were forwarded to the United States Attorney, who had the citizenship status of these randomly selected individuals investigated by the Immigration and Naturalization Service. Unless this record check produced positive confirmation of citizenship, such individuals were subjected to further investigation by the local district attorney or the FBI.

In the Brief For the Petitioners, petitioners argue that this case is moot. (Pet. Br. 16-22). Petitioners assert that the governmental conduct challenged by respondents ceased in 1982, and has not recurred in the intervening five years in spite of two federal elections subsequent to 1982. (Pet. Br. 18). Petitioners claim that the commencement of the investigation of bilingual voters was brought about by "unique conditions" that "no longer exist." (Pet. Br. 21). Petitioners argue that there is no reasonable likelihood that "the government would reinstitute any similar investigation," as the 1982 investigation was discontinued precisely because it was not successful in establishing evidence of voter fraud. (Pet. Br. 21). Finally, petitioners point out that, due to a change in California

law (California Government Code, § 6253.6), "it thus appears that government officials could not collect voter registration information in the same way as they did here, even if they wanted to do so." (Pet. Br. 21.) For these reasons, petitioners conclude that this case is moot, and that this Court should vacate the judgment of the court below and remand to the District Court with instructions to dismiss. (Pet. Br. 22.)

Because of the change in California law subsequent to the bilingual ballot investigation, respondents agree that this case is now moot and that the disposition urged by petitioners is appropriate. As it now appears that there is no dispute between the parties as to the question of mootness, respondents are immediately bringing this matter to the Court's attention by this motion.

THE CASE IS MOOT

Subsequent to petitioners' investigation of bilingual voters, the California Legislature amended the California Public Records Act to make it explicit that voter requests for bilingual ballots are not "public records," and to prohibit public officials from disclosing information "revealing the identity of persons who have requested bilingual ballots" to "any person other than public officers or public employees who are responsible for receiving those requests and processing the same." California Gov-

ernment Code, § 6253.6(a) (West Supp. 1987).[1] This change in the law means, as petitioners recognize (Pet. Br. 21), that petitioners could not pursue an investigation of bilingual voters in the same manner as the 1982 investigation.

Under this new statute, law enforcement officials would not be able to institute a criminal investigation of bilingual ballot requesters by simply requesting voting registrars to select at random the targets of the investigation. Rather, investigative officials would need a court order or other form of legal process to obtain this information.[2] As petitioners themselves acknowledge, under

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[1]California Government Code, 6253.6 provides:

> "(a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same." (Underscoring omitted.)

[2]The statutory scheme underscores the mandatory nature of the legislative direction in Section 6253.6 that bilingual ballot requests "shall not" be disclosed beyond local election officials. The Public Records Act delineates a number of categories of information that are exempt from disclosure. Cal. Government Code, § 6254. Case law, however, made it clear that these exemptions were permissive only, and that agencies had the discretion to disclose the information. *See Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 656, 117 Cal.Rptr. 106, 113 (1974); *Berkeley Police Assn v. City of Berkeley*, 76 Cal.App.3d 931, 941, 143 Cal.Rptr. 255, 262 (1977). Rather than treating bilingual ballot requests as exempt under Section 6254 (thereby permitting discretionary disclosure), the Legislature enacted a mandatory prohibition against disclosure of what it deemed non-public records.

this new statute "it would be impossible for the U.S. Attorney again to conduct a similar investigation *without court approval.*" (Suggestion for Full En Banc Rehearing filed in the Court of Appeals, October 8, 1986, at p.7) (emphasis added).

This change in the law effected by the new statute pertains directly to the governmental conduct challenged in this case. Respondents have never disputed that petitioners have the authority to investigate voter fraud, or, more precisely, that they have the authority to investigate whether non-citizens are illegally voting. Rather, respondents' complaint is with the means adopted to initiate and pursue such an investigation—namely, the targeting of randomly selected Chinese-speaking and Spanish-speaking individuals solely on the basis that they have requested a bilingual ballot and without any grounds to believe that the individuals selected are involved in violations of law. Under the new law, the voting registrars are prohibited from complying with a request by the United States Attorney to provide this information absent a court order or legal process. Thus, California citizens are no longer lawfully subject to becoming the target of a criminal investigation simply as a result of being randomly selected from a list of bilingual ballot users at the request of a law enforcement official acting in his unfettered discretion.[3]

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[3]Respondents have argued, and still maintain, that a criminal investigation which targets randomly-selected Chinese and Hispanic bilingual voters based solely on their request for a bilingual ballot constitutes a violation of rights guaranteed by

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As this Court has recognized, an intervening change in the law which prevents or substantially alters the governmental action or conduct challenged in a case renders moot claims for equitable relief against such action or conduct. Thus, in reviewing a decision enjoining the Interstate Commerce Commission from prescribing the forms of carriers' bills of lading, this Court held that new legislation which modified the powers of the ICC to prescribe such bills rendered the case moot:

> The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot.

United States v. Alaska Steamship Company, 253 U.S. 113, 116 (1920); *see also, e.g., Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972) (per curiam); *Princeton University v. Schmid,* 455 U.S. 100, 103 (1982) (per curiam).

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the First Amendment and the Equal Protection Clause. Because the new California statute substantially affects and restricts the means that were used to conduct the 1982 bilingual voter investigation at issue in this case, vacating the judgment below on grounds of mootness is an appropriate disposition of this case. However, if this Court determines that the case is not moot because of the likelihood of a recurring bilingual voter investigation, respondents are entitled to equitable relief. A discriminatory investigation against persons and groups exercising fundamental voting rights constitutes sufficient "extraordinary circumstances" and irreparable injury to warrant equitable intervention by a federal court.

The instant case thus goes beyond "voluntary cessation" of a course of action by government officials. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Rather, the change in the law prevents petitioners from being able to use in the future the same method used to conduct the 1982 investigation that was challenged by respondents in this case. Thus, the effect of the new statute is to vitiate any "reasonable expectation" that the respondents will again be subject to the same type of investigation instituted by a law enforcement official acting in his unfettered discretion. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).[4]

Respondents recognize that the appropriate disposition of a moot case is that the judgment below is vacated and the case remanded with a direction to dismiss. *United States v. Munsingwear*, 340 U.S. at 39. As petitioners and respondents thus agree that the case is moot and that the judgment below should be vacated, this "case has therefore lost its character as a present, live controversy ...." *Hall v. Beals*, 396 U.S. 45, 48 (1969).

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[4]In its en banc decision, the Court of Appeals ruled that the case was not moot because "Russoniello continues to have available to him the necessary bilingual ballot lists to conduct a voter registration investigation similar to the one challenged here." (Pet. App. 9a). Due to the change in California law, however, these "necessary bilingual ballot lists" are no longer "available to him" pursuant to an investigation "similar to the one challenged here."

CONCLUSION

For these reasons, respondents respectfully move this Court to vacate the judgment of the Court of Appeals and remand this case to the District Court with instructions to dismiss the action.

Respectfully submitted,

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